

No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ADRIAN AUSBERRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

APPENDIX

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 19a0425n.06

No. 18-5418

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,

FILED

Aug 15, 2019

DEBORAH S. HUNT, Clerk

Plaintiff-Appellee,

v.

ADRIAN AUSBERRY,

Defendant-Appellant.

**ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
TENNESSEE**

BEFORE: NORRIS, CLAY, and SUTTON Circuit Judges.

CLAY, Circuit Judge. Adrian Ausberry pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court increased Ausberry's Guidelines range based on its retroactive application of our decision in *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017), where we held that convictions for offenses with a *mens rea* of recklessness can constitute crimes of violence for purposes of the Sentencing Guidelines. Ausberry argues that the district court violated his due process rights by retroactively applying our decision in *Verwiebe* to enhance his Guidelines range. Alternatively, Ausberry contends that *Verwiebe* and another published decision from this Court were wrongly decided.

As explained below, we affirm.

I. BACKGROUND

On February 8, 2017, the Chattanooga Police Department executed a search warrant on a residence and found Ausberry, a convicted felon, in possession of a firearm. A federal grand jury indicted Ausberry for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). On August 9, 2017, Ausberry pleaded guilty without a written plea agreement.

Under the Sentencing Guidelines, a defendant faces a heightened Base Offense Level if he possesses a firearm after sustaining “felony convictions of either a crime of violence or a controlled substance offense.” U.S.S.G. § 2K2.1(a)(4). A felony conviction qualifies as a “crime of violence” if it “has as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S.S.G. § 4B1.2(a)(1).

When Ausberry committed and pleaded guilty to the firearms offense, this Circuit’s binding precedent provided that a previous conviction for a crime with a *mens rea* of recklessness could not qualify as a crime of violence under the Sentencing Guidelines. *See United States v. McFalls*, 592 F.3d 707 (6th Cir. 2010). After Ausberry pleaded guilty, but before he was sentenced, this Court decided *Verwiebe*, which overturned *McFalls* and held that an offense with a *mens rea* of recklessness can constitute a crime of violence.

Prior to Ausberry’s sentencing, probation prepared a Presentence Investigation Report (“PSI”). The PSI calculated Ausberry’s Base Offense Level as 24 because it found that Ausberry had two prior felony convictions for either a crime of violence or a controlled substance offense. One of Ausberry’s two prior felony convictions was for reckless aggravated assault under Tennessee law, which did not qualify as a crime of violence under *McFalls* but does under *Verwiebe*.¹ After upwards adjustments for specific offense characteristics and downward adjustments for acceptance of responsibility, Ausberry’s Total Offense Level was 27. Based on a Criminal History Category of VI and a Total Offense Level of 27, the PSI calculated Ausberry’s initial Guidelines range as 130 to 162 months of imprisonment. However, because the statutory 10-year maximum term of imprisonment was lower than the applicable Guidelines range,

¹ Ausberry did not dispute the PSI’s finding that his second prior felony conviction, for possession of cocaine for resale, constituted a “controlled substance offense” under U.S.S.G. § 2K2.1(a)(4).

Ausberry's final Guidelines sentence was 120 months of imprisonment—the maximum term permitted by statute.

Ausberry objected to the PSI's finding that his conviction for reckless aggravated assault under Tennessee law qualified as a crime of violence. Ausberry argued that applying *Verwiebe* to enhance his Guidelines range would violate due process because at the time he committed and pleaded guilty to his firearms offense, *McFalls* was binding precedent in this Circuit. Absent the retroactive enhancement based on *Verwiebe*, Ausberry's Total Offense Level (after adjustments) would have been 23 (instead of 27) and his Guidelines range would have been 92 to 115 months of imprisonment (instead of 120 months). Ausberry argued that due process required that the district court sentence him under the less onerous, pre-*Verwiebe* Guidelines range.

The district court overruled Ausberry's objections to the PSI and found that his reckless aggravated assault conviction qualified as a crime of violence under *Verwiebe*. The district court then granted Ausberry's motion for a downward variance from his Guidelines term of 120 months of imprisonment and imposed a 115-month sentence.

This timely appeal followed.

II. DISCUSSION

A. Due Process Claim

Ausberry contends that the district court violated his due process rights by subjecting him to a higher Guidelines range based on its retroactive application of *Verwiebe*. In response, the government argues the district court did not violate Ausberry's due process rights because the Supreme Court has held that the advisory Guidelines do not implicate fair warning concerns. As explained below, we hold that the district court did not violate Ausberry's due process rights.

1. Relevant Legal Principles

The *Ex Post Facto* Clause of the United States Constitution provides that “[n]o State shall . . . pass any . . . ex post facto Law.” U.S. Const. art. I, § 10, cl. 1. Over two centuries ago, the Supreme Court held that “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed” fell “within the words and the intent of the [constitutional] prohibition.” *Calder v. Bull*, 3 Dall. 386, 390 (1798) (describing *ex post facto* laws as “manifestly unjust and oppressive”). However, “the text of the [*Ex-Post Facto*] Clause makes clear [that] it ‘is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government.’” *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001) (quoting *Marks v. United States*, 430 U.S. 188, 191 (1977)). Further, the Supreme Court has held that challenges to retroactive applications of judicial decisions must proceed under due process, not the *Ex Post Facto* Clause. *See id.* at 460–62.

“[C]ore due process concepts [include] notice, foreseeability, and, in particular, the right to fair warning[.]” *Id.* 459. Using these due process principles, the Supreme Court has held that retroactive application of judicial decisions that unforeseeably expand the scope of criminal liability can violate a defendant’s due process rights. *See, e.g., Marks v. United States*, 430 U.S. 188 (1977); *Bouie v. City of Columbia*, 378 U.S. 347 (1964). This Court has previously indicated that due process principles of notice and fair warning could also “protect individuals . . . from *ex post* applications of unforeseeable judicial expansions of the *punishments* that result from a conviction.” *United States v. Beals*, 698 F.3d 248, 272 (6th Cir. 2012).

The Supreme Court has held that the advisory Sentencing Guidelines do not implicate the fair-warning concerns that due process protects. In *Irizarry v. United States*, 553 U.S. 708 (2008), the Supreme Court held that Federal Rule of Criminal Procedure 32(h) does not require that the

sentencing court notify a criminal defendant that the court plans to vary upwards from the Guidelines range because “[t]he due process concerns that motivated the Court to require notice in a world of mandatory Guidelines no longer” pertain. *Id.* at 714. And more recently, in *Beckles v. United States*, 137 S. Ct. 886 (2017), the Supreme Court held that the Sentencing Guidelines are not subject to a due process void-for-vagueness challenge because “[t]he advisory Guidelines . . . do not implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement.” *Id.* at 894. The Supreme Court explained that “even perfectly clear Guidelines could not provide notice to a person who seeks to regulate his conduct so as to avoid particular penalties within the statutory range . . . because even if a person behaves so as to avoid an enhanced sentence under the career-offender guideline, the sentencing court retains discretion to impose the enhanced sentence.” *Id.* The Supreme Court concluded that “[a]ll of the notice required is provided by the applicable statutory range, which establishes the permissible bounds of the court’s sentencing discretion.” *Id.*

2. Application to the Matter at Hand

The district court did not violate Ausberry’s due process rights by applying *Verwiebe* retroactively to increase Ausberry’s Guidelines range. Due process is concerned with “notice, foreseeability, and, in particular, the right to fair warning[.]” *Rogers*, 532 U.S. at 459. The Supreme Court has held that “[a]ny expectation subject to due process protection . . . that a criminal defendant would receive a sentence within the presumptively applicable Guidelines range did not survive [the Supreme Court’s] decision in *United States v. Booker*, 543 U.S. 220 (2005), which invalidated the mandatory features of the Guidelines.” *Irizarry*, 553 U.S. at 713. Further, the Supreme Court has stated that the advisory Guidelines “do not implicate” fair-warning concerns and that the statutory range associated with a conviction provides “[a]ll the notice required” under

the advisory Guidelines. *Beckles*, 137 S. Ct. at 894. The Supreme Court’s reasoning in *Irizarry* and *Beckles* requires that we hold that the district court did not violate Ausberry’s due process rights by retroactively applying *Verwiebe* to enhance his Guidelines range.

Ausberry relies on *Peugh v. United States*, 569 U.S. 530 (2013) to argue that retroactive application of *Verwiebe* violated due process. In *Peugh*, the defendant was convicted of bank fraud arising out of conduct that occurred in 1999 and 2000. *Id.* at 533. The defendant faced a Guidelines range of 30 to 37 months under the version of the Guidelines that was in effect when he committed the offense. *Id.* at 534. But new Guidelines had taken effect before sentencing, which increased the defendant’s Guidelines range to 70 to 87 months. *Id.* The Supreme Court held that the district court violated the *Ex Post Facto* Clause by sentencing the defendant under the “more onerous” Guidelines in effect at the date of his sentencing, rather than under the less punitive Guidelines that had been in force when he committed the offense. *Id.* at 538. The Court explained that “[d]istrict courts must begin their sentencing analysis with the Guidelines in effect at the time of the offense and use them to calculate the sentencing range correctly” because “those Guidelines will anchor both the district court’s discretion and the appellate review process” *Id.* at 549. Relying on *Peugh*, Ausberry argues that just as subjecting a defendant to a higher Guidelines range by retroactively applying an amendment to the Guidelines violates the *Ex Post Facto* Clause, subjecting Ausberry to a higher Guidelines range by retroactively applying this Court’s decision in *Verwiebe* violated due process.

The Court is not unsympathetic to Ausberry’s argument. At first blush, *Peugh* appears to support Ausberry’s contention that the district court violated his due process rights. But *Peugh* was firmly rooted in the *Ex Post Facto* Clause, not due process. In fact, *Peugh* reiterated that “a defendant *does not* have an ‘expectation subject to due process protection’ that he will be sentenced

within the Guidelines range.” *Id.* at 545 (emphasis added) (quoting *Irizarry*, 553 U.S. at 713–14). Because the *Ex Post Facto* Clause does not apply to retroactive applications of judicial decisions, *see Rogers*, 532 U.S. 451, and because the *Ex Post Facto* Clause and the Due Process Clause are not coextensive, *see id.* at 458, *Peugh* does not extend to judicial decisions interpreting the Sentencing Guidelines that retroactively increase a defendant’s Guidelines range.

Ausberry emphasizes the Supreme Court’s statement in *Rogers* that “limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process.” *Rogers*, 532 U.S. at 456. But *Rogers* does not support Ausberry’s argument that the district court violated his due process rights. In *Rogers*, the Supreme Court explained that *Bouie* “was rooted firmly in well-established notions of *due process*” such as “notice, foreseeability, and in particular, the right to fair warning[.]” *Id.* at 459. And the Supreme Court clarified that challenges to retroactive applications of judicial decisions must proceed under due process. *Id.* at 460–62. Because the Supreme Court has subsequently held that the Sentencing Guidelines do not implicate the fair-warning concerns that due process protects, *see Irizarry* and *Beckles*, *Rogers* did not prevent the district court from applying *Verwiebe* retroactively to increase Ausberry’s Guidelines range.

B. Under This Circuit’s Binding Precedent, Reckless Aggravated Assault Under Tennessee Law Is a Crime of Violence

Ausberry additionally argues that the district court erred by finding that his prior conviction for reckless aggravated assault under Tennessee law constitutes a crime of violence for purposes of the Sentencing Guidelines. Ausberry asserts Tennessee’s reckless aggravated assault, Tenn. Code Ann. § 39-13-102 (2005)², may be violated by reckless driving that results in injury; he

² This is the version of Tennessee’s aggravated assault statute that was in force when Ausberry was convicted for reckless aggravated assault in 2005. The subsequent modifications to the portions of the statute concerning reckless aggravated assault are immaterial to our analysis. *Compare* Tenn. Code Ann. § 39-13-102(a)(1)(B) (2005), *with* Tenn. Code Ann. § 39-13-102(a)(2) (2019).

contends that the Sentencing Commission did not intend to increase the Guidelines range for a defendant who had committed a reckless driving offense. In response, the government argues that Ausberry's argument fails because this Court has repeatedly held that reckless aggravated assault under Tennessee law qualifies as a crime of violence.

This Circuit has held, in a published decision, that reckless aggravated assault under Tennessee law categorically qualifies as a crime of violence. *United States v. Harper*, 875 F.3d 329, 330 (6th Cir. 2017); *see also United States v. Borden*, 769 F. App'x 266, 268 (6th Cir. 2019) (explaining that “*Harper* remains controlling authority in this circuit and aggravated assault in Tennessee categorically qualifies as a crime of violence”); *see also Lowe v. United States*, 920 F.3d 414, 416, n.1 (6th Cir. 2019) (holding that, under this Circuit’s binding precedent, “both reckless and intentional aggravated assault in Tennessee qualify as violent felonies”). In this Circuit, “a published prior panel decision ‘remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.’” *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)). Because there is neither an intervening Supreme Court decision nor a decision from this Court sitting en banc, *Harper* is binding on this Court. Thus, Ausberry’s conviction for reckless aggravated assault in Tennessee qualifies as a crime of violence.

In his reply brief, Ausberry alternatively contends that *Verwiebe* was wrongly decided. Ausberry waived this argument by failing to raise it in his principal brief. *See, e.g., Am. Trim, L.L.C. v. Oracle Corp.*, 383 F.3d 462, 477 (6th Cir. 2004) (explaining that “this court has consistently held that we will not consider” arguments presented for the first time in a reply brief). And even if we were to consider Ausberry’s argument, we would not overturn our decision in

Verwiebe. Because *Verwiebe* is a published opinion and there is neither an intervening Supreme Court decision nor a decision from this Court sitting en banc, *Verwiebe* remains binding precedent in this Circuit. *See Harper*, 875 F.3d at 330 (expressing disagreement with *Verwiebe*'s holding but stating that the Court is nonetheless "bound" to follow *Verwiebe*).

III. CONCLUSION

For the above-stated reasons, we affirm.

1 IN THE UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF TENNESSEE

3 AT CHATTANOOGA

4 :
5 UNITED STATES OF AMERICA, :
6 Plaintiff, :
7 v. : 1:17-CR-65
8 ADRIAN AUSBERRY, :
9 Defendant. :
10

Chattanooga, Tennessee
10 March 28, 2018

11 BEFORE: THE HONORABLE CURTIS L. COLLIER
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

14 FOR THE PLAINTIFF:
15

16 CHRISTOPHER D. POOLE
17 Assistant United States Attorney
18 U. S. Department of Justice
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22 FOR THE DEFENDANT:

23 MYRLENE R. MARSA
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26 SENTENCING HEARING

27 10a

UNITED STATES DISTRICT COURT

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1 guidelines his guidelines are technically over 120. But under
2 the guidelines that's defined at 120. So if the Court wanted
3 to look at 120 and vary down a little bit to give him benefit
4 of his acceptance of responsibility, that would put us in the
5 ballpark of 92 to 115 somewhere, also. So...

6 THE COURT: Thank you.

7 I think that the Court is required to rule upon
8 these objections, then. And the Court will take up the second
9 one first, and that is the change in the law. It's been
10 pointed out to the Court that the circuit has been pretty
11 clear in its ruling. And as a lower court, this Court is
12 bound to follow certain precedent, whether the Court agrees
13 with that precedent or not. And since the law is clear, the
14 Court will follow the circuit precedent. So the Court will
15 deny the second one.

16 On the other motion, the issue is a little more -- a
17 little more touchy. The guideline we're dealing with states,
18 "If reliable information indicates that the defendant's
19 criminal history category substantially overrepresents the
20 seriousness of the defendant's criminal history or the
21 likelihood that the defendant will commit other crimes, a
22 downward departure may be warranted."

23 We have discussed the defendant's criminal history
24 category and the nature of some of the prior convictions. The
25 Court notes though, that, according to the presentence report,
11a

1 this defendant has other involvement of a criminal nature,
2 which informs, to some extent, the seriousness of the
3 defendant's criminal history. For example, the defendant
4 indicates that in 2007 he was involved in a fight in which he
5 stabbed another person. In 2009 he was injured when he was
6 stabbed multiple times in a fight; he had to have multiple
7 surgeries because of this. Then in 2014 he was involved in a
8 misdemeanor domestic assault. And there is yet another
9 domestic assault charge pending. These four incidents would
10 suggest that the defendant's criminal history tends towards
11 violence.

12 The Court is persuaded, however, based upon both the
13 government's concession and Ms. Marsa's argument, that the
14 defendant is due some consideration for his guilty plea. So
15 the Court will remain in Offense Level 27, will consider that
16 the defendant's in Criminal History Category IV, so his
17 guideline range will be 100 to 125 months -- I'm sorry, 100 to
18 120 months.

19 MS. MARSA: Yes, Your Honor.

20 MR. POOLE: Yes, Your Honor.

21 MS. MARSA: Thank you.

22 THE COURT: That's correct, isn't it? 120 has to be
23 the top?

24 MR. POOLE: Yes, Your Honor, 120 is the statutory
25 max, Your Honor.

12a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE CHATTANOOGA DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

(For Offenses committed on or after November 1, 1987)

v.

Case Number: **1:17-CR-00065-CLC-CHS(1)**

ADRIAN AUSBERRY
USM#52347-074

Myrlene R Marsa
Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count(s): Count One of the Indictment.
- pleaded nolo contendere to count(s) which was accepted by the court.
- was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section and Nature of Offense	Date Violation Concluded	Count
18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2): Felon in Possession of a Firearm and Ammunition	02/08/2017	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. 3553.

- The defendant has been found not guilty on count(s).
- All remaining count(s) as to this defendant are dismissed upon motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

March 28, 2018

Date of Imposition of Judgment

/s/

Signature of Judicial Officer

Curtis L. Collier, United States District Judge

Name & Title of Judicial Officer

April 10, 2018

Date

13a

DEFENDANT: ADRIAN AUSBERRY
CASE NUMBER: 1:17-CR-00065-CLC-CHS(1)

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IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **115 months as to Count One**. This sentence shall run concurrent to any sentence imposed in the defendant's pending Hamilton County Criminal Court case, Docket Number 302321.

- The court makes the following recommendations to the Bureau of Prisons:
The court recommends that the defendant receive 500 hours of substance abuse treatment from the BOP Institution Residential Drug Abuse Treatment Program. The Court will further recommend that the defendant submit to a mental health evaluation while incarcerated. Lastly, the Court recommends the defendant obtain his GED and participate in job or vocational training.
- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
 - at a.m. p.m. on
 - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2 p.m. on .
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on

to ,
at ,
with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL**14a**

DEFENDANT: ADRIAN AUSBERRY
CASE NUMBER: 1:17-CR-00065-CLC-CHS(1)

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years**.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentencing of restitution. (*check if applicable*)
5. You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the mandatory, standard, and any special conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant must participate in a program of testing and treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.
2. The defendant must participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer. The defendant must waive all rights to confidentiality regarding mental health treatment in order to allow release of information to the supervising United States Probation Officer and to authorize open communication between the probation officer and the mental health treatment provider.
3. The defendant must take all medication prescribed by the treatment program as directed. If deemed appropriate by the treatment provider or the probation officer, the defendant must submit to quarterly blood tests to determine whether the defendant is taking the medication as prescribed.
4. The defendant shall waive all rights to confidentiality regarding mental health and substance abuse treatment in order to allow release of information to the supervising United States Probation Officer and to authorize open communication between the probation officer and the treatment providers.
5. The defendant must submit his person, property, house, residence, vehicle, papers, [computers (as defined in Title 18 U.S.C. § 1030(e)(1), other electronic communications or data storage devices or media,] or office, to a search conducted by a United States probation officer or designee. Failure to submit to a search may be grounds for revocation of release. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: ADRIAN AUSBERRY
CASE NUMBER: 1:17-CR-00065-CLC-CHS(1)

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments sheet of this judgment.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$0.00	\$0.00	\$0.00

The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution amount ordered pursuant to plea agreement \$

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options under the Schedule of Payments sheet of this judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

<input type="checkbox"/> the interest requirement is waived for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution
<input type="checkbox"/> the interest requirement for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ADRIAN AUSBERRY
CASE NUMBER: 1:17-CR-00065-CLC-CHS(1)

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A** Lump sum payments of \$ 100.00 due immediately, balance due
 - not later than _____, or
 - in accordance with C, D, E, or F below; or
- B** Payment to begin immediately (may be combined with C, D, or F below); or
- C** Payment in equal *(e.g., weekly, monthly, quarterly)* installments of \$ _____ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or
- D** Payment in equal *(e.g., weekly, monthly, quarterly)* installments of \$ _____ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or
- E** Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to **U.S. District Court, 900 Georgia Avenue, Joel W. Solomon Federal Building, United States Courthouse, Chattanooga, TN, 37402**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several

See above for Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.